Ng Pik Lian v Tai May Chean & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCvC)(A)-1349–07 OF 2019, W-02(NCvC)(A)-1330–07 OF 2019, W-02(NCvC)(A)-1331–07 OF 2019 AND W-02(NCvC)(A)-1350–07 OF 2019

KAMALUDDIN MD SAID, ABU BAKAR JAIS AND GUNALAN MUNIANDY JJCA

6 OCTOBER 2021

Civil Procedure — Appeal — Appeal against decision of High Court — High Court ordered inquiry to determine whether subject mentally disordered — Whether decision was a final order that was appealable — Whether High Court judge erred in fact and in law in finding prima facie case for inquiry — Whether High Court had jurisdiction to order son to produce mother for inquiry — Whether application was filed in bad faith — Mental Health Act 2001 s 52

Mental Disorders and Treatment — Mental Health Act 2001 — Section 52 — Inquiry Whether subject capable of managing affairs — Whether application should include medical evidence on mental state — Whether prima facie case must established before court could order inquiry — Whether High Court judge erred in finding prima facie case for inquiry — Whether subject had right to rebut prima facie case during inquiry

These were two related appeals originating from one originating summons ('OS') filed by Tai May Chean ('TMC') which was allowed at the High Court ('HC'). The main appeal was filed by Ng Pik Lian ('NPL'), the mother of TMC. The second appeal was by NPL's son and TMC's brother, Tai Hean Leng ('THL'). TMC had filed the OS, seeking an inquiry pursuant to s 52 of the Mental Health Act 2001 ('the MHA'), to determine whether NPL was mentally disordered and whether such mental disorder was making her incapable of managing herself and her affairs. The HC found some evidence that NPL might be mentally disordered and decided that a prima facie case had been proven for the inquiry. The HC also decided that THL must produce NPL for the inquiry but gave no reasons why THL must do so. NPL appealed on the ground that, inter alia, the learned HC judge ('HCJ') had failed to properly appreciate the legislative intent of the MHA and TMC's bad faith. THL appealed on the ground that, inter alia: (a) the HC had no jurisdiction to order that THL produce NPL for the inquiry; (b) the HCJ had not provided any reasons for granting the order to produce NPL; and (c) the HC failed to appreciate that the application for inquiry was not made in the interest of NPL

but had been pursued by TMC to further her personal interest for the litigation in various suits. The issues that arose for determination in the Court of Appeal, inter alia, were: (i) whether the HC's decision was a final order that was appealable; and (ii) whether the HC erred in fact and in law in finding a prima facie case for the inquiry.

Held, allowing the appeals with costs:

(1) Regarding the submission of TMC that NPL could not appeal against the decision of the HC, the court could not accept such contention. Once the HC made the order that an inquiry be held under s 52 of the MHA, that order in itself was a final decision that disposed of the right of the parties. As it was a final order, NPL had every right to appeal against that order made by the HC. An order such as this was so conclusive in nature that a fundamental right of the NPL had been affected. She must be given the right to appeal under the present circumstances of the case (see paras 22 & 25).

(2) The word 'order' in s 3 of the Courts of Judicature Act 1964 ('the CJA') was important to be noted in the context of the case. TMC had used this word in her own OS for the inquiry from the HC. Section 3 of the CJA, clearly indicated that an order meant a decision and not a ruling. In this regard, an order made by the HC entailed a right to appeal to Court of Appeal as provided under s 67(1) of the CJA. The two statutory provisions above, contrary to the submission of TMC, indeed showed that NPL could and had the right to appeal against the decision of the HC (see paras 27–29).

(3) In respect of THL's own appeal, the order made against him to produce NPL was also a final order made by the HC. The HC had effectively ordered THL to shoulder the responsibility of ensuring the presence of NPL for the inquiry. There was nothing tentative about such an order. THL therefore, must be given the right to appeal against that order by the HC (see para 30).

(4) Even if TMC had raised a prima facie case, that did not mean that NPL could not rebut the prima facie case that she might be mentally disordered. The learned HC judge ('HCJ') erred in ordering the inquiry immediately after it was decided that a prima facie case had been established. Depriving NPL's right to rebut the prima facie case, resulted in the HC prematurely ordering the inquiry without hearing the rebuttal evidence from NPL. This was a serious error on the part of the HC because was a fundamental principle that a prima facie case is always rebuttable. This serious error alone meant that the main appeal by NPL had to be allowed (see paras 34 & 45).

(5) There was a need to take note of how and why TMC had filed the OS to question her mother's mental condition. The OS was filed by TMC only after she had a bitter dispute with NPL. It was very acrimonious in nature because NPL although the biological mother of TMC, had even lodged a police report that resulted in a criminal prosecution against the latter. On top of that, they were engaged in several suits against each other. All these suggested that the OS was not filed with the utmost interest of NPL in the mind of TMC. After all, three siblings of TMC denied that NPL might be mentally disordered. The HC failed to sufficiently appreciate these circumstances before granting the order for inquiry based on the OS. The HC should not have shut its eyes and mind to the circumstances that brought about the filing of that OS by TMC. The HC also should not have acted mechanically by merely looking at s 52 of the MHA to order the inquiry. The intention of TMC with regards to the filing of the OS, based on the antecedent background between TMC and NPL, should have been considered, analysed and proved before ordering the inquiry (paras 61–62).

(6) In respect of THL's appeal, the fact that NPL was under his care alone could not mean that THL must produce NPL for the inquiry, contrary to the suggestion of TMC. The HCJ acted without jurisdiction in ordering THL to produce NPL for the inquiry. No provisions were shown by the HCJ that would allow for the order against THL to be made. Equally important to note was the undisputed fact that the HCJ did not give or address at all the reasons supporting the HC's decision requiring THL to produce NPL for the inquiry (see paras 71 & 73).

[Bahasa Malaysia summary

Ini adalah dua rayuan berkaitan dari saman pemula ('SP') yang difailkan oleh Tai May Chean ('TMC') yang dibenarkan di Mahkamah Tinggi ('MT'). Rayuan utama difailkan oleh Ng Pik Lian ('NPL'), ibu kepada TMC. Rayuan kedua adalah oleh anak lelaki NPL dan saudara TMC, Tai Hean Leng ('THL'). TMC telah memfailkan SP untuk satu inkuiri di bawa s 52 Akta Kesihatan Mental 2001 ('AKM'), untuk menentukan sama ada NPL mempunyai masalah mental dan sama ada masalah mental tersebut menyebabkan tidak mampu menguruskan dirinya dan urusannya. MT telah mendapati bahawa terdapat bukti bahawa NPL mungkin mengalami masalah mental dan memutuskan bahawa kes prima facie telah terbukti untuk untuk inkuiri tersebut. MT juga memutuskan bahawa THL haruslah memastikan kehadiran NPL untuk siasatan tetapi tidak memberi alasan mengapa THL mesti berbuat demikian. NPL merayu atas alasan bahawa, antara lain, hakim MT yang terpelajar ('HMT') telah terkhilaf dalam menafsirkan peruntukan AKM dan niat buruk TMC. THL merayu atas alasan bahawa, antara lain; (a) HMT tidak mempunyai bidang kuasa untuk memerintahkan bahawa THL menghasilkan NPL untuk siasatan; (b) HMT tidak memberikan sebab dalam membenarkan

perintah untuk memastikan kehadiran NPL; dan (c) HMT terkhilaf dalam menilai permohonan inkuiri tidak dibuat demi kepentingan NPL tetapi disebabkan kepentingan TMC untuk kepentingan peribadinya di dalam litigasi dipelbagai saman. Isu-isu yang timbul untuk penentuan di Mahkamah Rayuan ini adalah: (i) sama ada keputusan HMT adalah perintah muktamad yang boleh dirayu; dan (ii) sama ada HMT terkhilaf dari segi fakta dan undang-undang dalam memutuskan kes prima facie untuk inkuiri tersebut.

Diputuskan, membenarkan rayuan-rayuan dengan kos:

(1) Mengenai hujahan TMC bahawa NPL tidak boleh merayu terhadap keputusan MT, mahkamah ini tidak dapat menerima hujahan tersebut. Apabila MT membenarkan perintah bahawa inkuiri perlu dijalankan menurut s 52 AKM, perintah tersebut adalah keputusan muktamad yang melupuskan hak pihak-pihak. Oleh kerana ianya adalah perintah muktamad, NPL mempunyai hak untuk merayu terhadap perintah yang dibuat oleh MT. Perintah ini adalah konklusif hak asal NPL telah terjejas. Dia mempunyai hak untuk merayu dalam kes ini (lihat perenggan 22 & 25).

(2) Perkataan 'perintah' di dalam s 3 Akta Mahkamah Kehakiman 1964 (''AMK') adalah penting untuk ditafsirkan di dalam konteks kes ini. TMC telah menggunakan perkataan tersebut di dalam SP sendiri untuk prosiding inkuiri di MT tersebut. Seksyen 3 AMK dengan jelas menunjukkan bahawa perintah tersebut bermaksud keputusan dan bukannya perintah. Di dalam kes ini, perintah yang dibuat oleh MT tersebut melibatkan hak untuk merayu kepada Mahkamah Rayuan seperti yang diperuntukkan di bawah s 67(1) AMK. Kedua-dua peruntukan undang-undang di atas, bertentangan dengan hujahan TMC, sememangnya menunjukkan bahawa NPL boleh dan mempunyai hak untuk merayu terhadap keputusan MT (lihat perenggan 27–29).

(3) Berkenaan dengan rayuan THL sendiri, perintah yang dibuat terhadapnya untuk memastikan kehadiran NPL juga merupakan keputusan akhir yang dibuat oleh MT. MT telah mengarahkan THL untuk bertanggungjawab memastikan kehadiran NPL untuk inkuiri tersebut. Tiada yang tentatif tentang perintah seperti tersebut. Oleh itu, THL haruslah diberi hak untuk merayu terhadap perintah tersebut oleh MT (lihat perenggan 30).

(4) Walaupun TMC telah membangkitkan kes prima facie, hal ini tidak bermakna bahawa NPL tidak boleh mengakas kes prima facie bahawa dia mungkin mempunyai masalah mental setelah kes prima facie dibangkitkan. Dengan melucutkan hak NPL untuk membantah kes prima facie, tersebut menyebabkan MT memerintahkan inkuiri awal tanpa mendengar bantahan dari NPL. Hal ini adalah kesilapan serius MT prinsip asas kes prima facie boleh selalu dibantah. Kesalahan serius

ini menyebabkan rayuan utama oleh NPL terpaksa dibenarkan (lihat perenggan 34 & 45)

(5) TMC telah memfailkan SP untuk mempersoalkan keadaan mental ibunya. SP tersebut difailkan oleh TMC hanya selepas dia mempunyai pertikaian dengan NPL. Ia bersifat tidak baik kerana NPL yang merupakan ibu kandung TMC, bahkan telah membuat laporan polis yang mengakibatkan pendakwaan jenayah terhadap yang terakhir. Selain itu, mereka terlibat dalam beberapa saman terhadap satu sama lain. Semua ini menunjukkan bahawa SP tersebut tidak difailkan dengan kepentingan NPL. Lagipun, tiga adik-beradik TMC menafikan bahawa NPL mungkin mengalami masalah mental. MT terkhilaf untuk menilai keadaan ini sebelum memberikan perintah untuk inkuiri berdasarkan SP tersebut. MT tidak sepatutnya menutup mata dan fikirannya kepada keadaan yang membawa pemfailan SP itu oleh TMC. MT juga tidak sepatutnya bertindak secara mekanikal dengan hanya melihat s 52 MHA untuk memerintahkan inkuiri. Niat TMC berkenaan dengan pemfailan SP, berdasarkan latar belakang antara TMC dan NPL, sepatutnya telah dipertimbangkan, dianalisis dan dibuktikan sebelum memerintahkan enkuiri (lihat perenggan 61–62).

(6) Berkenaan dengan rayuan THL, fakta bahawa NPL berada di bawah jagaannya sahaja tidak bermakna THL haru memastikan kehadiran NPL untuk enkuiri tersebut, bertentangan dengan cadangan TMC. HMT bertindak tanpa bidang kuasa dalam memerintahkan THL untuk memintak kehadiran NPL untuk inkuiri tersebut. Tiada peruntukan yang membenarkan HMT yang membolehkan perintah terhadap THL dibuat. Selain itu, fakta yang tidak dipertikaikan adalah HMT tidak memberi alasan yang menyokong keputusan MT yang memerlukan THL untuk memerintahkan kehadiran NPL untuk inkuiri (lihat perenggan 71 & 73).]

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2004] 2 MLRA 547, FC (refd)
Cathcart, Re [1892] 1 Ch 549, CA (refd)
Prem Singh & Ors v Kirpal Singh [1989] 2 MLJ 89, HC (refd)
Tan Poh Lee & Ors v Tan Kim Choo @ Tan Kim Choon & Anor [2018] 6 MLJ 141, CA (refd)
Tee Wee Kok v Teh Liang Teik & Ors [2010] 3 MLJ 84, HC (refd)
Wong Kim v Loh Kim Foh [2003] 4 MLJ 535, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 67(1)
Mental Disorders Ordinance 1952 (repealed by Mental Health Act 2001)
Mental Health Act 2001 s 52, 52(1)

Appeal from: Originating Summons No WA-24NCVC-2129–10 of 2018 (High Court, Kuala Lumpur)

Michael Chow (Wong Zhi Khung with him) (Michael Chow) in Civil Appeal Nos W-02(NCvC)(A)-1349–07 of 2019, W-02(NCvC)(A)-1330–07 of 2019, W-02(NCvC)(A)-1331–07 of 2019 and W-02(NCvC)(A)-1350–07 of 2019 for the appellant.

Chetan Jethwani (Chetan Jethwani & Co) Civil Appeal Nos W-02(NCvC)(A)-1349–07 of 2019, W-02(NCvC)(A)-1330–07 of 2019, W-02(NCvC)(A)-1331–07 of 2019 and W-02(NCvC)(A)-1350–07 of 2019 for the first respondent.

Kelvin Seet Wan Nam (Lau Zhong Yan with him) (Chooi & Company + Cheang & Ariff) in Civil Appeal Nos W-02(NCvC)(A)-1349–07 of 2019, W-02(NCvC)(A)-1330–07 of 2019, W-02(NCvC)(A)-1331–07 of 2019 and W-02(NCvC)(A)-1350–07 of 2019 for the second respondent.

Abu Bakar Jais JCA:

INTRODUCTION

[1] There were initially four related appeals before us. All originated from one originating summons ('OS') filed at the High Court ('HC') by Tai May Chean ('TMC'). The appeals arose because the OS was allowed by the learned HC judge. Two appeals were subsequently withdrawn before us in open court. We were therefore left with two appeals. The main appeal is filed by Ng Pik Lian ('NPL'). NPL is the mother of TMC. The second appeal is by NPL's son and TMC's brother, Tai Hean Leng ('THL').

[2] TMC, through the OS, wanted an inquiry to be done to determine whether her own mother, NPL, is mentally disordered. The HC ordered the inquiry. TMC was also granted by the HC an order that THL produce NPL for the inquiry. Thus, NPL appealed the learned HC judge's decision ordering the inquiry and THL appealed against the order that he is required to produce NPL for the same.

BACKGROUND FACTS

[3] Since 2013, separate from the present action, there are several legal suits between NPL and TMC. The suits are about family assets. Since then, TMC is estranged from NPL. They are no longer in a cordial and filial relationship. They stayed apart and kept their distance from each other.

[4] There was also criminal prosecution against TMC for criminal breach of trust with regard to family company funds upon complaint by NPL.

[5] In one of the suits, TMC applied to strike out the same on the ground that NPL has no mental capacity to litigate. Wong Chee Lin JC (as she then was) interviewed NPL in open court and refused TMC's striking out application.

[6] In yet another suit, Ong Chee Kuan JC dismissed the same. He found among others, that TMC had bad faith in pursuing the suit. In this suit, TMC among others had applied to remove NPL from being a director in the family company.

[7] It is a fact that only after many years of acrimonious litigations between the two, did TMC apply for the inquiry against NPL before the HC. The inquiry was applied pursuant to s 52 of the Mental Health Act 2001 ('MHA') to determine whether NPL is mentally disordered and whether such mental disorder is making her incapable of managing herself and her affairs.

HC'S DECISIONS

[8] The HC found some evidence that NPL might be mentally disordered. Therefore, the HC decided that a prima facie case has been proven for the inquiry.

[9] The HC had followed the Court of Appeal case of *Tan Poh Lee & Ors v Tan Kim Choo @ Tan Kim Choon & Anor* [2018] 6 MLJ 141 regarding prima facie case to order the inquiry.

[10] In following *Tan Poh Lee*, the HC must have not considered and heard the rebuttal to the prima facie case before ordering the inquiry.

[11] The HC also decided that THL must produce NPL for the inquiry but gave no reasons why THL must do so.

NPL'S SUBMISSION

[12] NPL's grounds of appeal are as follows:

(a) the learned HC judge failed to properly appreciate the legislative intent of the MHA and TMC's bad faith;

(b) that TMC, as a hostile party has no locus standi in mounting an application under s 52 of the MHA;

(c) the learned HC judge misunderstood s 52 of the MHA and hence adopted the wrong test;

(d) the learned HC judge misconstrued *Tan Poh Lee*; and

(e) the learned HC judge overlooked that the power under s 52 of the MHA must be exercised with restraint.

THL'S SUBMISSION

[13] The HC has no jurisdiction to order that THL produce NPL for the inquiry. Even if there is jurisdiction, the evidence adduced does not support the order against THL.

[14] There is no reason given by the learned HC judge why the order to produce NPL was made against THL.

[15] The HC failed to appreciate that the application for inquiry is not made in the interest of NPL but had been pursued by TMC to further her personal interest for the litigation in the various suits.

TMC'S SUBMISSION

[16] There are two points raised by TMC at para 2.7 of her written submission in resisting NPL's present appeal.

[17] The first point contended by TMC before us is that NPL has no right to appeal against the HC's decision. This is because the HC's decision is not a final decision that had finally disposed the rights of the parties.

[18] It is also contended that the HC did not err in fact and in law in finding a prima facie case for the inquiry.

[19] TMC also argued against THL's appeal that THL could not appeal against the HC's decision ordering THL to produce NPL. This is because the learned HC judge only found a prima facie case for the inquiry. As such, this is not a final order that is appealable even for THL.

[20] THL must produce NPL as he admitted NPL is under his care. After all, THL following the HC's order for the OS, had brought NPL for the inquiry.

OUR DECISION

[21] Since the application for inquiry is premised on s 52 of the MHA, for clarity, this statutory provision is laid down here as follows:

(1) The Court may, on an application made before it, make an order directing an inquiry to determine whether a person subject to the jurisdiction of the Court and *alleged to be mentally disordered is incapable of managing himself*

and his affairs due to such mental disorder.

(2) The order of the Court under subsection (1) may also contain directions for inquiries to be made concerning —

(a) the nature of the property belonging to the person alleged to be mentally disordered;

(b) the persons who are his relatives;

(c) the period during which he has been mentally disordered; or

(d) such other questions as the Court deems proper.

(3) The application for such an inquiry may be made by a relative of the person alleged to be mentally disordered, or by any public officer nominated by the Minister for the purpose of making the application. (Emphasis added.)

[22] With regard to the submission of TMC that NPL could not appeal against the decision of the HC, respectfully we could not accept such contention. We are of the opinion that once the HC made the order that an inquiry be held under s 52 of the MHA, that order in itself is a final decision that disposes of the right of the parties. As it is a final order, NPL has every right to appeal against that order made by the HC.

[23] The order made means NPL will be subjected to an inquiry to determine whether she is mentally disordered. It is not beyond expectation that she will be subjected to a more elaborate medical examination in order to determine her mental health. There is nothing not final about it. It is an order made affecting her fundamental right not to be questioned, probed and examined by anyone suspicious of her own faculty. The order for inquiry is such an intrusive order against her basic right to enjoy her freedom of living freely and independently without interference from others.

[24] After all, she had resisted and strongly contested TMC's application for the said inquiry. She insisted there is no need for the inquiry as she is not mentally disordered. It is beyond comprehension and an injustice if she has no right to appeal against that decision of the HC ordering the inquiry.

[25] One must look at the nature of the order to determine its finality. An order such as this, is so conclusive in nature that a fundamental right of the appellant had been affected. She must be given the right to appeal under the present circumstances of the case.

[26] Section 3 of the Courts of Judicature Act 1964 ('the CJA') states as follows:

A Decision means judgment, sentence or *order*, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties; (Emphasis added.)

B **[27]** The word 'order' above is important to be noted in the context of this case. TMC had used this word in her own OS for the inquiry from the HC. She had requested in her own application an order that the inquiry be held against her mother. In the above statutory provision, it is clearly indicated an order means a decision and not a ruling. The word 'Decision' in the statutory provision above too covers or is synonymous with judgment, sentence and not C least, an order.

[28] In this regard, an order made by the HC entails a right to appeal to this court. This is stated in s 67(1) of the CJA as follows:

D The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or *order of any High Court* in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought. (Emphasis added.)

E **[29]** The two statutory provisions of the CJA above, contrary to the submission of TMC, indeed show that NPL could and has the right to appeal to this court against the decision of the HC.

F **[30]** In respect of THL's own appeal, the order made against him to produce NPL, is also a final order made by the HC. The HC had effectively ordered THL to shoulder the responsibility of ensuring the presence of NPL for the inquiry. There is nothing tentative about such an order. THL therefore, must be given the right to appeal against that order by the HC.

G **[31]** On the contention of TMC that the HC did not err in fact and in law in finding a prima facie case for the inquiry, it is first argued that the correct legal test and relevant evidence had been applied and considered respectively by the HC. Citing the Court of Appeal case of *Tan Poh Lee*, TMC submitted that H she had established a prima facie case in proving there was substance to substantiate the allegation that her mother might be mentally disordered and incapable of managing herself and her affairs due to such mental disorder.

[32] *Tan Poh Lee* held as follows:

I (1) An application made pursuant to s 52 of the MHA involved a two-tier process. First, the applicant had to establish a *prima facie case before an inquiry under* s 52 could be ordered. In determining whether there was a prima facie case, the Court had to ascertain whether there was substance to substantiate the allegation that a person was mentally disordered. At that

stage, it was not required to be conclusive proven that a person was mentally disordered.

(2) Having found that the appellants had established a prima facie case, the HC judge fell into error by proceeding to analyse the appellants' case like it was a full hearing on merits and concluding that the prima facie case had been rebutted by the medical reports produced by R2. It had to be noted that the appellants complained that they could not produce latest medical reports on R1 because they were denied access to him. On finding that a prima facie case had been established, the judge should have ordered an inquiry to be conducted under the MHA. The inquiry was the next step before any order to administer the affairs of R1 was made or otherwise. By treating the application for leave as if it was a full hearing on its merits and by deciding the case summarily, the judge had short-circuited the procedure contained in s 52 of the MHA and had denied the remedy to the appellants summarily.

(3) On finding that the appellants had established a prima facie case, the judge should at that point have considered whether to proceed with the inquiry without considering the rebuttal evidence. *The rebuttal evidence was only to be considered at the next stage, after the inquiry,* when the judge had to consider whether to make the orders to administer the affairs of R1. (Emphasis added.)

[33] From the above, as can be clearly seen *Tan Poh Lee* requires a prima facie case to be established before the inquiry could be ordered. But what does a prima facie case at any stage entail? A prima facie case means it is always rebuttable. A court could find a prima facie case for one party but the opposite party, as a matter of justice, is always afforded the opportunity to rebut a prima facie case. In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2004] 2 MLRA 547, Justice Augustine Paul (later FCJ) in explaining a prima facie case said as follows:

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in Mozley and Whiteley's Law Dictionary, 11th edn as:
>
> > A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. *A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.*
>
> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand, if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier in order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive

A evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. (Emphasis added.)

B **[34]** Thus, in the context of the present case before us, even if TMC had raised a prima facie case, that does not mean NPL could not rebut the prima facie case that she might be mentally disordered.

C **[35]** Equally important to consider is the question when must anyone rebut a prima facie case. Rebutting a prima facie case certainly must be in the same proceeding. One need not wait until a different proceeding to rebut a prima facie case. Waiting that long is simply too late. It goes against the grain of evidentiary rules if one is asked to defer rebutting a prima facie case at the earliest possible time.

D

[36] In the context of the present case, when the HC decided TMC had proven a prima facie case, what should have been done is to afford NPL an opportunity for her to rebut the prima facie case. She has every right to rebut the prima facie case at that stage. It is totally unfair for her to undergo the E inquiry first before she can bring her evidence to rebut the prima facie case. Why must she be asked to be the subject of the inquiry or participate in the same before she could rebut the prima facie case? The prima facie case has already greatly affected her right. She must be allowed to bring evidence to rebut the prima facie at that stage. In fact, in rebutting the prima facie case, she F could even question the evidence by TMC that is said to be sufficient for that prima facie case. She could do this and should not be prevented from doing so by having to undergo the inquiry first.

G **[37]** Further, she should not be subjected to a more elaborate medical examination in the inquiry itself before she is allowed to rebut the prima facie case. It goes without saying this is not a mundane medical check-up at the local clinic. She will have to undergo much more than the routine temperature check by her family doctor, once she is ordered to undergo the inquiry. The inquiry is H a serious order made encroaching on her personal rights. That is why she should be given the right to rebut the prima facie case at the earliest possible time before the inquiry itself. After all, if she could summon medical evidence apart from other evidence before the inquiry itself to prove that she could not possibly be mentally disordered, she should not be prevented from doing so. If I she could do so, then that in itself, is a rebuttal to the prima facie case.

[38] Another facet to the application for the inquiry at this stage is for the judge to evaluate whether the prima facie case has been rebutted before the inquiry itself. If it can be decided by cogent evidence that the prima facie case

has been rebutted, the subject, in this case, NPL is entitled not to endure the more detailed examination that will ensue in the inquiry.

[39] Yet another aspect to such application for an inquiry is that the applicant ie TMC in this case must be required to be ready with sufficient proof why she is questioning her mother's mental condition. As it is a serious application affecting her mother's rights, her evidence supporting the application must not be trivial or guesswork in nature. Inevitably TMC's case for the application, should preferably include medical evidence on her mother's mental state. After all, one could not be said even to be potentially mentally disordered without at least medical evidence. It is common knowledge that it is not an easy task to say that anyone might even be mentally disordered without medical evidence. If such evidence is provided by TMC, only then could it be decided that a prima facie case has been proven against NPL that she might be mentally disordered. However, immediately after that, NPL should be allowed to rebut the prima facie case instead of promptly being subjected to the inquiry. This court is not unaware that TMC had submitted she had no opportunity to bring NPL for any medical examination before she filed the OS. That may be so but as will be shown, there are other considerations that would justify the HC's decision against NPL to be set aside.

[40] Further, *Tan Poh Lee* indicates that once there is a prima facie case, the subject (NPL in this case) will have to undergo the inquiry. That would mean only after the inquiry, NPL is allowed to rebut the prima facie case raised by her daughter. This is very significant to be noted. The rebuttal following *Tan Poh Lee*, could not even be given in the inquiry itself. It must be given after the inquiry. That much is clear from the judgment of *Tan Poh Lee* as shown earlier.

[41] First, with respect, what good will it do for the rebuttal to be given only after the inquiry? There is no real purpose if the rebuttal is to be given at that late stage. This is because the inquiry after it is completed, could well mean the subject is already found to be mentally disordered and is incapable of managing himself and his affairs due to such mental disorder. After all, this is exactly the purpose of the inquiry having regard to s 52 of MHA as narrated earlier. Hence the very purpose of that inquiry could well have ended at that stage. It would then be too late and pointless for the subject to rebut the prima facie case.

[42] Further, if *Tan Poh Lee* is to be followed, the medical experts of NPL are entitled to assist her in rebutting the prima facie case only after the inquiry. In the meantime, the poor mother is forced to endure what could potentially turn out to be an unnecessary inquiry. That is why NPL should be allowed to rebut the prima facie case before the inquiry starts. After all, it is also consistent with the principle of rebutting the prima facie case once it is raised without further ado.

[43] Besides, waiting for the inquiry to be completed before giving the opportunity to NPL to rebut the prima facie case, could well mean a different judge might be presiding for the rebuttal than the one finding a prima facie case made out by TMC. This is because of the potentially long process of the inquiry. This should be avoided. Preferably the same judge finding a prima facie case should also be the arbiter in deciding whether that prima facie case has been rebutted or not. This is more likely to happen if the judge that decided a prima facie case is also the judge to immediately consider the merits of the rebuttal before the inquiry.

[44] The scheme of MHA essentially means that after a prima facie case is proven, the subject ie NPL in this case, should be allowed to rebut that prima facie case. If the rebuttal is accepted, that will be the end of the matter. Hence, no inquiry will be ordered. If it is not accepted, only then the inquiry will be ordered. The inquiry itself then will be in two-tier. First, is to establish that the subject is indeed mentally disordered. If this is not proven, the matter ends there. If this is proven, then the second stage will have to be established. This second stage is to prove that the mental disorder has indeed resulted in the subject being incapable of managing himself and his affairs due to such mental disorder. Mental disorder alone is insufficient. The mental disorder must have caused the subject to be incapable of managing himself and his affairs. This is the thrust of the matter if one looks at s 52(1) of the MHA.

[45] Therefore, based on all that has been explained above, with respect, the learned HC judge erred in ordering the inquiry immediately after it was decided that a prima facie case had been established. She must have decided so as she had followed *Tan Poh Lee*. The HC should have given NPL the right to rebut the prima facie case before ordering the inquiry. Depriving NPL to rebut the prima facie case at that stage, resulted in the HC to prematurely order the inquiry without hearing the rebuttal evidence from NPL. With respect, this is a serious error on the part of the HC because it is a fundamental principle that a prima facie case is always rebuttable. This serious error alone should mean the main appeal by NPL must be allowed.

[46] In submitting a prima facie case has been proven, TMC referred to the testimony of NPL in a criminal case at the sessions court where TMC was the accused and NPL was the complainant. TMC referred to the answers given in the trial of that criminal case, where NPL gave incoherent answers upon being questioned. She said she has 11 children, when the fact is she has six children. She said she is 60 when she is actually 85. She said one of the children name is 'Tan Hen Heng', when she had none by that name.

[47] Replying to TMC on the above incidents, first NPL asserted through her affidavit that she was nervous when she testified in that case and not feeling

very well on that day. This should have been accepted by the HC as NPL felt uncomfortable and she was understandably under great stress to testify in court against her own daughter, TMC.

[48] Further, considering that NPL is 85 years old or thereabouts, she should not be expected to remember all the finer details of her life. Those details she gave incorrectly, should not be a basis to say NPL might be mentally disordered. In view of NPL's position as the mother of TMC, it would be quite daunting and not easy for her to testify in court where the accused was her own daughter and she herself was the complainant.

[49] TMC also referred to the incident when her father passed away. A few days after, TMC came for the final prayer ceremony and she met her mother, NPL. Her mother did not recognise her and asked who she was. TMC had to repeat her name several times before her mother could recognise her and she cried.

[50] With regard to this incident after the death of her father, the HC should have appreciated the animosity that existed between NPL and her daughter over the family assets. NPL naturally was upset with her daughter on the dispute over family properties. It brought great shame to the family. There is every likelihood she had pretended not to recognise her because of TMC's attitude and approach in being hostile towards her regarding these properties. She was strongly displeased with TMC and pretending not to recognise her, could be a form of registering her profound unhappiness towards her daughter.

[51] In respect of the suits between TMC and NPL, the former also referred to an incident where NPL's own counsel was not prepared for NPL to be cross-examined because of her own mental condition. This TMC submitted is another incident to suspect and question NPL's mental health. NPL's counsel also sought adjournment for the trial of the suits. In seeking this adjournment, another doctor's letter indicating that NPL had poor short-term memory was shown. This too according to TMC supported her application for the inquiry.

[52] The incidents above, though may be substance for the application for inquiry, must not be taken with a blinkered view. An 85 years old lady may not on certain days be ready to testify in court because of her old age and should be permitted to have her off-days, so to speak. However, that does not mean she might be mentally disordered. While in respect of the doctor's letter, the most that is said was that NPL had poor short-term memory. Having poor short-term memory alone must not be taken to mean a possibility of mental disorder. It would not be far-fetched to note quite a number are facing such condition but to definitively say they may be mentally disordered is incorrect, let alone offensive. It should also not be forgotten, to amount to a possible

A mental disorder, that poor short-term memory must also have caused NPL to be incapacitated of managing herself and her affairs.

B **[53]** TMC also applied for one of the suits to be struck out on the ground of NPL's questionable mental condition but Wong Chee Lin JC (as she then was) refused that application. One of the reasons given by the learned judicial commissioner was that she could not find that NPL was mentally disordered because there was no inquiry pursuant to the MHA. In fact, it was found by the learned judicial commissioner that NPL was quite alert.

C **[54]** During the course of hearing in respect of these suits, not in the hearing of the OS, NPL showed a report by Dr Sng Kim Hock ('Dr Sng') who had personally examined her. Dr Sng in the report found NPL to be fully mentally fit and with normal upper brain cognitive functions. NPL also did not have dementia and was fully capable of making her own decisions, choices and opinions.

D

E **[55]** TMC in turn showed a report by Dr Gurdeep Singh Grewal ('Dr Gurdeep'), again not for hearing for the OS, who basically challenged the findings of Dr Sng. However, it must be noted that Dr Gurdeep did not examine NPL. He gave his report and criticised Dr Sng's report without having NPL before him to be examined. Hence, no or little weight should be given to Dr Gurdeep's report. TMC also engaged Dr Chee Kok Yoon ('Dr Chee') to comment on the report written by Dr Sng. Dr Chee's report is also not for the OS itself. Again, similarly as Dr Gurdeep, Dr Chee did not examine NPL. He also criticised Dr. Sng's report but since he did not examine NPL, his report should not carry much weight.

F

G **[56]** Further, both Dato Dr Tai Hean Sing ('THS') and Tai Hean Kiat ('THK'), the brothers of TMC and THL filed affidavits to oppose TMC's OS for the inquiry. THS affirmed that NPL is a fiercely independent lady and is alert and leads an independent and purposeful life. THS affirmed further that she is not lacking in anyway with regards to her mental abilities. THK said the same things about NPL and added basically she could go about her daily life normally.

H

[57] Thus, we have THS, THK and THL, three children of NPL denying that NPL might be mentally disordered. While TMC is without support from any of her own siblings that NPL's mental condition is a matter of concern.

I

[58] Loke Kam Yong ('LKY') is a hairdresser of NPL who also affirmed an affidavit opposing TMC's OS. LKY essentially affirmed that NPL frequents her salon to do her hair and engages in conversation and pays her own bills and leaves just like everyone else. LKY's affidavit standing alone might not be

sufficient. However, her affidavit taken with other affidavits supporting NPL, should be more than enough to doubt the assertion of TMC that NPL might be mentally disordered. LKY's affidavit should be taken as corroborating NPL's position that there is not even a possibility that she is mentally disordered.

[59] In any event, regarding all these incidents, it is undisputed that NPL was not under any form of expert medical observation and examination on her brain functions at the material time. Without this observation and examination medically, it should be obvious that NPL must not even be considered as possibly mentally disordered.

[60] The fact remains no matter that there might be some evidence supporting TMC for a prima facie case in view of these incidents, NPL was never allowed to rebut TMC on her prima facie case. Therefore, the HC acted unfairly towards NPL. Her rebuttal on the incidents narrated above may not be favourable and accepted by the HC but nonetheless, the HC has a duty to first hear her rebuttal no matter how weak that rebuttal might be.

[61] There is also a need to take note how and why TMC had filed the OS to question her mother's mental condition. The OS was filed by TMC only after she had a bitter dispute with NPL. It is very acrimonious in nature because as stated, NPL, although the biological mother of TMC, had even lodged a police report that resulted in a criminal prosecution against the latter. On top of that, they were engaged in several suits against each other. All these would suggest that the OS filed by TMC was not filed with the utmost interest of NPL in the mind of TMC. TMC's OS was earnestly pursued more likely by the desire to fight her mother to the very bitter end. After all, as stated, not one but three siblings of TMC denied that NPL might be mentally disordered.

[62] The HC with respect failed to sufficiently appreciate the circumstances highlighted above before granting the order for inquiry based on TMC's OS. The HC should not have shut its eyes and mind to the circumstances that brought about the filing of that OS by TMC. The HC also should not have acted mechanically by merely looking at s 52 of the MHA to order the inquiry. The intention of TMC with regards to the filing of the OS based on the antecedent background between her and her mother, should have been considered, analysed and probed before ordering the inquiry. After all, the one most affected by the inquiry would be NPL and nobody else, including TMC. The HC thus has a duty in this regard to be vigilant in studying all possible reasons why the OS was filed by TMC. After all, the court must act in the interest of justice above anything else.

[63] In this regard, it is worth to note the approach taken in *Tee Wee Kok v Teh Liang Teik & Ors* [2010] 3 MLJ 84, where an application was made under the

then Mental Disorders Ordinance 1952 as a consequence of a bitter family feud. The court held that:

> [8] ... Going through para 18 of encl 2, it is abundantly clear that the sole aim of this application is related to the suits that are afoot. In encl 11, paras 7–12 again the averments of the plaintiff relate to the pending suit. The position is the same with regards to paras 14–19 of encl 22. *The court is of the view that the plaintiff's application is not made in the best interest of TLT but merely to protect and preserve the position of the plaintiff in respect of the suits pending. The court cannot and will not allow an application under the MDO which does not take the interest of TLT into account but made purely to protect the plaintiff's commercial interest.* (Emphasis added.)

[64] Similarly the Singapore High Court in *Prem Singh & Ors v Kirpal Singh* [1989] 2 MLJ 89, held as follows:

> The court's jurisdiction under the Mental Disorders and Treatment Act should only be exercised for the benefit of a mentally disordered person. I do not think this court ought to sanction a course of procedure which is likely to lead to further distress to the patient on account of the *bitter dispute between the respondent and some of this children*. (Emphasis added.)

[65] Likewise, in *Wong Kim v Loh Kim Foh* [2003] 4 MLJ 535, the application for an inquiry was also dismissed because the court noted there were family disputes and it is said as follows:

> ... I find this application to be not only disturbing, but also misplaced. I also find it to be incongruous to the overall scheme and purpose of the MDO, which in the main is to provide for the care, protection and treatment of a mentally disordered person. *The defendant is now locked in a family dispute*. It is hoped that this falling-out amongst them will be quickly resolved so that his wish to go home can be met and in the process be reunited with the plaintiff. In the twilight of his life, he deserves some peace and quiet. (Emphasis added.)

[66] Even in the UK, in *Re Cathcart* [1892] 1 Ch 549, Kay LJ said as follows:

> *Such a proceeding should only be adopted where there is danger or homicide or suicide, or immediate risk to the health of the person against whom it is made.* In the conduct of the Petitioner there are no traces of the kind and considerate conduct which a husband ought to adopt towards his wife. He has not succeeded in shewing that he acted without personal motives and solely with a view to the best interests of his wife. *His real motive was to enrich himself and to obtain the position of master of Wootton. Lastly, he was not justified in commencing these proceedings unless he had reasonable grounds for believing that his wife was 'of unsound mind and incapable of managing herself and her affairs.* (Emphasis added.)

[67] There is ample evidence that TMC filed the application for an inquiry against her mother, NPL, in bad faith. She also filed the same only to serve her own personal interest having regard to the following:

(a) since 2013, TMC has been estranged from the family and is deeply involved in more than one suits with NPL, over family assets;

(b) TMC even engaged a private investigator against NPL for the litigations;

(c) in Kuala Lumpur Suit No WA-24NCC-334–08 of 2016, TMC even argued that NPL was healthy and fit because it suited her position;

(d) TMC remains cold towards her own mother, NPL, since 2013 and had refused to visit her at her home;

(e) only in 2018, after years of litigations against her own mother in court and just when the suits have been set down for trial, TMC filed applications to strike out the suits on the ground that NPL has no mental capacity to litigate.

[68] In another suit, Ong Chee Kwan JC found against TMC as follows:

> [41] ...
>
> c. It seems disingenuous for the Plaintiff to have commenced the MHA Suit and sought to stay all legal proceedings by the 2nd Defendant against her on the around that the 2nd Defendant does not have the mental capacity to manage herself and her affairs and to instruct solicitors and in the next instant commenced this action against the 2nd. Defendant asserting that she is the wrongdoer in control of UER which has caused the company to be incapacitated from bring an action against TYYR;
>
> ...
>
> [42] Given the backdrop of the multitude of legal proceedings currently pending between the Plaintiff and the 2nd Defendant relating to the family businesses, the Court cannot but be alive to the possibility that the Plaintiff's present action is part of her strategy in furthering her own personal interests in the legal proceedings against the parties therein rather than the interest of the 1st Defendant.
>
> [43] ... Based on the facts of this case, in particular, the timing of this action in the context of the backdrop of the legal proceedings, the institution of the MHA Suit followed thereafter with the Plaintiff commencing this action against the 2nd. Defendant, a step that is inconsistent with her grounds stated in her applications to stay the 2nd Defendant's suits against her, I am not persuaded that this is the case here.
>
> [44] In the circumstances, it is my view that the requirement of 'good faith' on the part of the Plaintiff has not been established in this case.

[69] Thus, based on the aforesaid, in applying for the inquiry, TMC's lack of good faith and conduct should also be relevant considerations. One should not be allowed to use the application as a disguise to show concern for the well-being of the subject ie NPL. The overall scheme of MHA would be frustrated if that is permitted to happen.

[70] Based on all the reasons highlighted, the appeal by NPL is allowed.

[71] In respect of THL's appeal, the fact that NPL is under his care alone could not mean that THL must produce NPL for the inquiry, contrary to the suggestion of TMC. There is nothing that should be further imposed on THL for taking care of his mother. Being filial, it is expected for THL to take care of NPL. That does not mean he must also be instructed to produce his mother for the inquiry.

[72] The submission of TMC that THL also had obeyed the order by producing NPL for the ongoing inquiry could not mean he should be held responsible to bring the latter in the first place. He had obeyed the order simply because if he did not comply with the same, he will be liable for contempt of a court order.

[73] More importantly, the learned HC judge acted without jurisdiction to order THL to produce NPL for the inquiry. No provisions were shown by the learned HC judge that would allow for the order against THL to be made. Equally important to note is the undisputed fact that the learned HC judge did not give or address at all the reasons supporting the HC's decision requiring THL to produce NPL for the inquiry.

[74] Hence, it is inevitable that THL's appeal must also be allowed.

CONCLUSION

[75] The orders made by the HC against both NPL and THL are final in nature, allowing both to rightly appeal against the HC's decisions. Hence, the submission by TMC that the HC's orders have not finally disposed of the rights of NPL and THL could not be accepted.

[76] The HC had erred in depriving NPL the right to raise her rebuttal against the prima facie case proven by TMC. Before ordering the inquiry, there is a need to hear the rebuttal of NPL immediately after the prima facie case raised by TMC. In following *Tan Poh Lee*, this must not have been done by the HC.

[77] TMC had not filed the OS in good faith for the inquiry to be granted. There are reasons as highlighted to question the real motive why TMC had pursued the OS.

[78] Based on all the reasons explained, we are unanimous in allowing the appeals of both NPL and THL with costs against TMC. The HC's decisions against NPL and THL must accordingly be set aside.

Appeals allowed with costs; High Court's decision set aside

Reported by K Selvaraju